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No. 82-799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY AND NATIONAL TREASURY EMPLOYEES UNION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL TREASURY EMPLOYEES UNION

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QUESTION PRESENTED

Whether Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), requires that a federal agency pay a per diem allowance and travel expenses to employee union representatives engaged in collective bargaining with the agency.

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STATEMENT

A. Statutory Background

1. Congress enacted the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 ("the Act") in October, 1978. That Act contains the first statutory program

governing labor-management relations in the federal sector. Title VII of the Act, 5 U.S.C. (Supp. V) 7101 *et seq.*, replaced the labor relations program previously maintained under Presidential Executive Orders.[1]

In Title VII, Congress for the first time declared that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. (Supp. V) 7101(a). After conducting extensive public hearings, Congress declared that, based on "experience in both private and public employment," a statutory collective bargaining system would "contribute[] to the effective conduct of public business" and "facilitate[] and encourage[] the amicable settlements of disputes" between the government and its employees. In Title VII, Congress devised a comprehensive collective bargaining program for federal employees and established an independent Federal Labor Relations Authority ("FLRA" or "the Authority") to supervise the federal sector collective bargaining process. The FLRA, which is modeled largely on the private sector's National Labor Relations Board, has full authority, *inter alia*, to issue orders against unfair labor practices (5 U.S.C. (Supp. V) 7118) and to seek enforcement of those orders in appropriate United States courts of appeals (*id.* 7123(b)). Persons aggrieved by any final FLRA order may seek judicial review in the court of appeals. *Id.* 7123(a).

At issue in the instant unfair labor practice proceeding is the FLRA's interpretation of the Act's requirement that agencies must grant "official time" to employee represen-

[1]The program was created in 1962 by Exec. Order No. 10988, 3 C.F.R. 521 (1959-1963 Compilation). It was revised by Exec. Order No.11491, 3 C.F.R. 861 (1966-1970 Compilation), which was in turn amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634 (1971-1975 Compilation) and 3 C.F.R. 957 (1971-1975 Compilation).

tatives negotiating collective bargaining agreements. Specifically, the Authority has construed this grant of official time as including travel expenses. The provision at issue specifies that "[a]ny employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status." 5 U.S.C. (Supp. V) 7131(a). In addition to this mandatory provision, the section also allows for permissive official time. An agency and union may agree to the use of official time for representational activities when appropriate in contexts outside collective bargaining negotiation. *Id.* 7131(d).

Congress used the term "official time" in a context where there already existed a long-standing statute providing travel expenses or per diem allowances for all trips on "official business" and for "official travel." The Travel Expense Act of 1949, as amended,[2] provides a specified per diem allowance for any employee "traveling on official business away from his designated post of duty" or reimbursement for actual expenses of such "official travel." 5 U.S.C. (Supp. V) 5702(a) and (c). Thus, Congress mandated "official time" for employee representatives negotiating collective bargaining agreements under the Civil Service Act where a pre-existing statute provided travel expenses or per diem allowances for any employee traveling on "official business" or embarked on "official travel."

[2]The 1949 Act had its origin in the Subsistence Expense Act of 1926, which first provided travel expenses for federal employees traveling on "official business." Ch. 457, 44 Stat. 688.

Finally, outside the negotiating arena, Title VII vests the FLRA with power to determine when employees are entitled to "official time" for participating on behalf of unions in proceedings before that body. 5 U.S.C. (Supp. V) 7131(c). The FLRA's predecessor in this regard was the Assistant Secretary of Labor for Labor-Management Relations, who conducted proceedings under the Executive Order Programs. See Section 6, Exec. Order 11491, *supra*. The Assistant Secretary's long-standing regulations provided "official time" for employees who were necessary witnesses at hearings and expressly provided that "necessary transportation and per diem expenses shall be paid by the employing agency or activity." 29 C.F.R. 206.7(g) (1974 Compilation). Thus, Congress gave the FLRA authority in Title VII to grant official time for employee representatives participating in administrative proceedings where the official time previously given for employee participation in such proceedings had included travel expenses.

2. In order to understand the context in which Congress designated "official time" for employee representatives, it is necessary to trace the history of the use of such time under the Executive Order programs. Much of this history is set out in a series of reports by a study committee and by the Federal Labor Relations Council ("FLRC"), the Authority's predecessor under the Executive Orders. These reports were before the 95th Congress as it deliberated regarding the official time provisions of Title VII. Study Committee Report and Recommendations, August 1969; Federal Labor Relations Council, Report and Recommendations on the Amendment of Executive Order 11491; Federal Labor Relations Council, Report and Recommendations on the Amendment of Executive Order 11491, as amended (*Legis. Hist.* 1218-1243; 1258-1267; 1283-1335).[3]

[3]The reports are reprinted in Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service,

The original (1962) labor-management relations Executive Order allowed agencies to require all collective bargaining negotiations to be conducted on non-duty hours.[4] The Comptroller General[5] concluded that the decision to allow agencies to require negotiations during off-duty hours meant that negotiations by employee representatives were "outside the regular tour of duty" and were "not to be regarded as official business of the Government." 44 Comp. Gen. 617, 618 (1965). He therefore ruled that traveling expenses were not authorized under the Travel Expense Act and were not payable from government funds. Similarly, he ruled that government payment of travel expenses of employee representatives was not authorized for general attendance of meetings or consultations held pursuant to the Executive Order because such attendance was "to further the interests of the [labor] organization," rather than the government. 45 Comp. Gen. 454, 455 (1966). The Comptroller General retreated somewhat, however, in deference to the guidelines devised by the Civil Service Commission, the agency then charged with overseeing labor-management issues. He sanctioned

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96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* (Comm. Print 1979) ("*Legis. Hist.*").

[4]Section 9 of Exec. Order 10988, *supra*, provided *inter alia*:

> Officially requested or approved consultations and meetings between management officials and representatives of recognized employee organizations shall, whenever practicable, be conducted on official time, but any agency may require that negotiations with an employee organization which has been accorded exclusive recognition be conducted during the non-duty hours of the employee organization representatives involved in such negotiations.

[5]As discussed *infra* p. 36, the Comptroller General was denied a role in authorizing expenditures involved in FLRA proceedings under the Civil Service Reform Act.

the Commission's proposed guidelines authorizing travel expenses in certain circumstances under the limited Executive Order program. 46 Comp. Gen. 21 (1966). The Commission would generally deny travel expenses for employee representatives negotiating agreements. But an agency would have "the latitude to pay travel expenses where particular circumstances justify the payment," *e.g.*, where the government held a meeting at a particular site chosen for economic considerations. *Id.* at 21-22. The Comptroller General deferred to the Commission's expertise as to what payment of travel expenses could be viewed as "essential to the fulfillment of the objective of employee-management cooperation" contemplated by the Executive Order. *Id.* at 22.

In 1969, an official study committee issued a report on the Executive Order program and made recommendations for changes. As to the use of official time for negotiations, the committee noted a lack of uniformity – some agencies allowed, and some disallowed, official time. It recommended that the Executive Order be changed to deny any official time to employee representatives when negotiating agreements. The committee reasoned that "an employee who negotiates an agreement on behalf of a labor organization is working for that organization, and should not be in a duty status when so engaged." *Legis. Hist.* 1236. Accordingly, the new Executive Order provided that "[e]mployees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management." Section 20, Exec. Order No. 11491, *supra*.

This flat prohibition against use of official time for negotiations, however, proved unsatisfactory. In 1971, the FLRC issued its first report on the Executive Order pro-

gram. The FLRC noted that this "controversial" policy prohibiting official time had "unfavorable effects on the negotiation process," producing "difficulties in scheduling negotiation sessions, and delays in completing negotiations because of a union's inability to provide representation." *Legis. Hist.* 1264-1265. Balancing these adverse consequences against some discerned benefits, the FLRC came out in favor of lifting the prohibition against official time. Its recommended change, however, was quite limited. The new approach would "permit the negotiating parties, when circumstances warrant, to agree to a reasonable amount of official time for employees who represent the union in negotiations during regular working hours." The proposed change was intended to "promote responsible collective bargaining" and "avoid undue hardship or delay in negotiations." But the use of official time would still be strictly limited in an attempt to foster "union self-support" and provide incentives "to economical and business-like bargaining practices." *Id.* at 1265. It was under this quite limited approach that the Council declared that "[o]vertime, premium pay, or travel expenditures are not authorized." *Id.* at 1264.

The President adopted the Council's proposals and revised the Executive Order to allow parties to negotiate official time within prescribed limits. Employees could, at the most, obtain official time "for up to 40 hours or ... up to one-half the time spent in negotiations during regular working hours." Section 20, Exec. Order 11616, *supra.* The last FLRC Report noted that negotiations over official time had caused some problems and delays.* But the

*The Report also noted Council approval of the Assistant Secretary's regulations granting official time – which included travel expenses – for employees appearing as witnesses at hearings. *Legis. Hist.* 1334.

Council recommended no change, concluding that the official time policy on balance fostered effective negotiations while "minimizing financial hardships on individual employees." *Legis. Hist.* 1334-1335. The policy therefore remained unchanged until Congress enacted 5 U.S.C. (Supp. V) 7131(a), providing *mandatory* official time for *all* negotiations.

B. Proceedings Below

1. The facts giving rise to this unfair labor practice proceeding are not in dispute. Petitioner Bureau of Alcohol Tobacco and Firearms ("Bureau") maintained an area office of its Western Region in Lodi, California. Respondent National Treasury Employees Union ("NTEU") was the exclusive representative for the employees at this office. In November, 1978, the Bureau notified the affected NTEU Chapter that it intended to relocate the Lodi office to Sacramento, California (about 34 miles away) and establish a reduced Post of Duty Office at another location in Lodi (Pet. App. 22a; Jt. Exh. 1 at R. 111[7]). The action would require relocating nine employees from Lodi to Sacramento. NTEU advised the Bureau that it wished to negotiate the move, or alternatively, negotiate the impact the move would have on bargaining unit employees. The union named Donald Pruett, a steward in NTEU's Fresno Area Office, to represent NTEU in the matter (*ibid.;* Jt. Exh. 2 at R. 112). As the administrative law judge subsequently found, the Bureau decided "that since Pruett and [the Bureau's] own Chief of Field Operations, Thomas Crone, had not yet seen the facilities under discussion, it

[7] "R" refers to the Record of the FLRA.

would be to everyone's best interest to conduct the negotiations and view the various new facilities at the same time" (Pet. App. 22a; See R. 147). Thus, the Bureau's Personnel Specialist informed Pruett that the negotiating parties would all travel to the site of the new Sacramento office, meeting at 9:30 a.m. on February 23, 1979 (Pet. App. 22a-23a).

At this Sacramento meeting, Pruett represented NTEU, while management was represented by the Personnel Specialist, the Chief of Field Operations and two other management employees. The group examined the future work space, cafeteria facilities and parking facilities. They discussed matters such as where office walls should be built, location of work desks, access to restrooms and to parking. The group next proceeded to Lodi, where they had lunch and then met at the new Lodi office to examine and discuss those facilities. They then adjourned to the old Lodi Area Office and further discussed the impact of the planned move and, specifically, the various proposals that the union had submitted. Pruett generally expressed satisfaction with the new facilities except for the parking arrangements at Sacramento, and management agreed to continue to try to obtain closer parking space (Pet. App. 24a-25a). The parties also discussed leave adjustments for newly transferred employees encountering commuting problems and arrangements for two employees involuntarily reassigned (*Id.* at 26a; R. 144). Management agreed to hold group meetings for affected employees and to meet separately with the two involuntarily transferred workers to discuss anticipated assignments (*ibid.*).

The day of the meetings, Pruett left his home in Madera, California at 6:15 a.m. and returned at 5:45 p.m., driving a total of 303 miles in his own car (Pet. App. 25a n.7). Two days beforehand, he had requested to be

paid for the time spent at the meetings.[8] But the Bureau denied his request and instructed him to take either annual leave or leave without pay for the day. Management informed him in writing that its employees could not receive official time or excused leave for midterm negotiations "or reimbursement for any expenses in connection with Midterm negotiations" (Pet. App. 23a n.5; Jt. Exh. 4 and 5 at R. 114, 115). Accordingly, Pruett used eight hours of annual leave for February 23 (Pet. App. 23a n.5).

NTEU filed an unfair labor practice charge in June 1979, and the FLRA General Counsel subsequently issued a complaint, based on the Bureau's failure to grant Pruett official time and travel and per diem expenses for the February 23 negotiations. After a hearing, the administrative law judge ("ALJ") concluded that the Bureau's action did constitute an unfair labor practice in violation of 5 U.S.C. (Supp. V) 7116, relying on an Interpretation and Guidance issued by the FLRA, 2 F.L.R.A. No. 31 (1979).

In that Interpretation and Guidance, the Authority had concluded that 1) the official time provisions of Section 7131(a) of the statute encompass all collective bargaining, including mid-term negotiations[9] and 2) employees on official time under Section 7131(a) are entitled to payments from the agency for travel and per diem expenses. As to travel expenses, the FLRA reasoned that it was equated with "paid time" and, thus, an employee negotiating a con-

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[8]Specifically, he asked that the meeting be incorporated with a "quarterly" meeting under the collective bargaining agreement or that he be permitted to take "bank time" for the period (Pet App. 23a).

[9]The Bureau has not sought review of the decision that mid-term negotiations, such as those involved here, are covered under Section 7131(a) in addition to negotiations of a basic collective bargaining agreement.

tract "is not in leave status" (Pet. App. 42a). The Authority noted that Congress rejected the Executive Order's restricted use of official time, under which travel expenses were not allowed (*id.* at 42a n.6).

While neither the statute nor legislative history expressly adverted to travel expenses, the Authority noted, "it is well established that such expenses are authorized when an employee 'is engaged on official business for the Government' " under 5 U.S.C. (Supp. V) 5702 (the Travel Expense Act). Because Congress declared in the Civil Service Reform Act that collective bargaining furthered the effective conduct of "public business" and was in the "public interest," the FLRA concluded that an employee negotiating an agreement "while on paid time entitled to his or her usual compensation and not in a leave status, is clearly engaged on 'official business for the Government' " (Pet. App. 43a). Moreover, Congress indicated its intent that union representatives be given similar prerogatives to that of management representatives, who are uniformly paid transportation and per diem expenses (*id.* at 43a). Payment of travel expenses would "more nearly equate the status of union and management negotiators as contemplated by Congress" and would also serve the declared statutory purpose by facilitating more effective union representation at the bargaining table (*id.* at 44a). The Authority also noted that provision of travel expenses under 713(a) comported with the Authority's unchallenged regulations authorizing such expenses for witnesses at FLRA proceedings, whenever they were given official time under Section 7131(c) (Pet. App. 44a-45a).

In the instant proceeding, the FLRA summarily affirmed the ALJ's decision, adopting his findings and conclu-

sion regarding the unfair labor practice charge against the Bureau (Pet. App. 15a-17a). The Bureau petitioned for review in the United States Court of Appeals for the Ninth Circuit, which affirmed the FLRA's decision as "reasoned and supportable" regarding both official time and travel expenses (*id.* at 5a). The Court noted that the FLRA issued its Interpretation pursuant to its statutory authority to provide leadership in establishing policies and guidelines and to carry out the purposes of Title VII (Pet. App. 4a; 5 U.S.C. (Supp. V) 7105(a)(1)). The court agreed that union negotiators on official time "should be interpreted to be on official government business within the meaning of 5 U.S.C. § 5702(a)," in light of Congress's declaration that collective bargaining contributes to the effective conduct of public business. "[L]abor representatives should be treated similarly to other government employees conducting business for the government" (Pet. App. 10a). It further agreed that this construction comported with Congress's decision that the positions of management and labor should be equalized with regard to collective bargaining (*ibid.*). Finally, the court rejected the Bureau's contention that availability of expenses would impair the willingness of union negotiators to reach agreement. The court noted the statute's good faith negotiation requirement and provisions for impasse proceedings, as well as the fact that the FLRA's interpretation "yields no more advantage to labor negotiators than that formerly possessed by management negotiators" (*Id.* at 11a).

SUMMARY OF ARGUMENT

The court of appeals correctly affirmed the FLRA's reasoned interpretation of the official time provision of the Civil Service Reform Act. In 5 U.S.C. (Supp. V) 7131(a), Congress designated all negotiation of collective bargaining agreements as official government duty, thus invoking the travel allowance and per diem provision of the Travel Expense Act, which provides reimbursement for "official business" and "official travel." 5 U.S.C. (Supp. V) 5702(a) and (c).

Congress deliberately rejected past approaches and notions under the Executive Order programs, which had restricted official time and travel expenses. Under the new statute, for the first time union representatives were provided official time for any and all time spent negotiating agreements. The statute declared collective bargaining to be "in the public interest," contributing to "the effective conduct of public business." 5 U.S.C. (Supp. V) 7101(a). Congress strengthened the collective bargaining program to achieve substantial benefits for the government in the form of increased labor harmony and productivity. Instead of being outside an employee's regular tour of duty, collective bargaining for a union was now recognized as properly done while on official duty status. Instead of being viewed as performed only in the interest of the union, collective bargaining was now recognized as performed in the government's interest. Travel expenses were thought inappropriate for collective bargaining under an Executive Order where official time was only a matter of negotiation, subject to strict limits. But Congress now designated bargaining the official work of the government, thus invoking the provisions of the Travel Expense Act. Congress intended union negotiators to be allowed official time on

the same terms as management, *i.e.*, including travel expenses and per diem allowances.

Duties for which Congress provides "official time" are properly viewed as official government business, unlike activities for which excused "leave" is provided. Official time status means that an employee carries the normal attributes of employment. No leave is required, there is no loss of seniority for purposes of annual and sick leave accumulation, or reduction-in-force retention standing, or retirement status. The employee would be deemed engaged "in the performance of his duty" for purposes of the Federal Employee Compensation Act, and almost surely as "acting within the scope of his office of employment" for purposes of the Federal Tort Claims Act. 5 U.S.C. (Supp. V) 8101 *et seq;* 28 U.S.C. (Supp. V) 1346(b). Congress provides "official" duty status for activities directly related to the government's business and allows only "leave" for other types of activities that are to be encouraged, but not to be viewed as the government's business.

Employer payment of the travel expenses of union negotiators is entirely consistent with the federal sector labor-management scheme. Congress chose to promote and actually subsidize federal employee unions for cogent policy reasons designed to achieve the desired benefits of collective bargaining. Congress wanted a strong collective bargaining program in order to obtain higher productivity from the federal workforce. But providing federal employees with the input needed for better labor relations proved difficult where Congress also chose to grant employee organizations a narrow role. In addition, federal employee unions were given heavy responsibilities on behalf of all employees without the economic advantage of an "agency shop." To counter such disadvantages, Con-

gress opted to provide benefits for unions and actually underwrite some representation costs in the federal sector, in a manner unknown in the private sector.

Congress left statutory construction issues such as this one to the expertise of the FLRA, which properly exercised its authority in this case. The decision is in full accord with statutory construction principles. It reasonably interprets legislative intent in light of Congress's rejection of prior practices. It broadly construes remedial legislation to further the important statutory purposes of encouraging collective bargaining and correcting past inequalities favoring management. The decision comports with congressional intent to provide union negotiators with official time "just as" for management negotiators, who receive travel expenses. Finally, the decision interprets the statute "in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. (Supp. V) 7101(b). The interpretation puts the union on a more equal footing with management, which may choose at will to travel for negotiations. Yet the statute provides sufficient restrictions on official time and adequate checks against abuses in order to promote cost-efficient collective bargaining.

ARGUMENT

IN PROVIDING "OFFICIAL TIME" FOR EMPLOYEES NEGOTIATING COLLECTIVE BARGAINING AGREEMENTS FOR UNIONS UNDER 5 U.S.C. (SUPP. V) 7131(a), CONGRESS DESIGNATED SUCH WORK AS OFFICIAL GOVERNMENT DUTY AND THUS INVOKED THE TRAVEL AND PER DIEM PROVISIONS OF 5 U.S.C. (SUPP. V) 5702.

A. In Enacting 5 U.S.C. (Supp. V) 7131(a), Congress Rejected All Past Notions Restricting Official Time and Travel and Designated Collective Bargaining Negotiations As the "Official" Work of the Government.

The Civil Service Reform Act marked a significant departure from past treatment of collective bargaining in general and official time for negotiations in particular. Before passage of this Act, there was no legislative or executive decision that collective bargaining in the federal sector was in the public interest and no *requirement* that an employee negotiating for a union be granted *any* official time. After extensive public hearings, in-depth consideration of past practices, and lengthy deliberations, Congress chose to treat the collective bargaining process entirely differently under the new statute than under the old Executive Order programs. The FLRA, charged with establishing statutory policies and carrying out the purposes of the Act, has given the most reasonable construction of the "official time" provision: Congress deemed negotiation of collective bargaining agreements to be the official work of the government within the meaning of the pre-existing travel and per diem statutory provisions. The court below correctly affirmed the FLRA's "clearly defensible" interpretation of the statute (Pet. App. 11a).

The language and history of Section 7131(a) support the FLRA's construction that employees negotiating collective bargaining agreements are entitled to both official time and travel expenses. Congress had long provided a per diem allowance to any employee "traveling on official business away from his designated post of duty" or reimbursement of actual expenses of "official travel." 5 U.S.C. (Supp. V) 5702(a) and (c).[10] With this treatment of "official business" and "official travel" already in place, Congress designated collective bargaining negotiation as work performed in the government's interest. For the first time, it mandated that employees be given "official time" for any and all time spent negotiating agreements. Congress thus put such employees on official duty status without qualification.[11] The statute itself declares for the first time that "collective bargaining in the civil service [is] in the public interest"[12] and "contributes to the effective conduct of public business." 5 U.S.C. (Supp. V) 7101(a). Congressman William Ford, a member of the House conference committee and one of the leading proponents of the legislation, described Title VII as imposing "obligations on employee representatives that serve both the public interest and the public business." 124 Cong. Rec. 38718 (1978); *Legis. Hist.* 999-1000.[13] Indeed, the legislative history is replete with descriptions of the benefit the government would derive from collective bargaining in

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[10]See *supra* n. 2, at p. 3.

[11]See *infra* n. 15, at pp. 26-27.

[12]The Second Circuit demonstrably erred in concluding otherwise. *Division of Military and Naval Affairs v. FLRA*, 683 F.2d 45, 48 (1982), petition for cert. pending, No. 82-1021 (filed Dec. 16, 1982).

[13]The D.C. Circuit has properly given these remarks by Congressman Ford significant weight in construing the statute in another context. *American Federation of Government Employees v. FLRA*, 702 F.2d 1183, 1187-1188 (1983).

terms of increased harmony, cooperation and productivity. See, *e.g.*, 124 Cong. Rec. 29186 (1978) (statement of Rep Clay); *id.* at 29197 (statement of Rep. Ford); 123 Cong. Rec. 8524 (1977) (statement of Sen. Inouye); *Legis. Hist.* 931, 953, 1005; Report of the President's Task Force on Employee Management Relations in the Federal Service, *Legis. Hist.* 1188, 1190, 1194.

This statutory treatment of labor-management relations stands in sharp contrast to the view of collective bargaining negotiation under the discarded Executive Order program. Under the Executive Orders, there was no declaration – and certainly no *congressional* proclamation – that collective bargaining furthered the government's interest. Moreover, Congress chose to deal with the negotiation of collective bargaining agreements by employee representatives in an entirely different manner than under the presidential program, where such work was deemed to be rightfully outside regular duty and done in the interests of the unions and not the government. For this reason, the Bureau is simply wrong in maintaining (Br. at 17-18) that Congress ratified or codified a previous practice against providing travel expenses for employee representatives. The fact is that Congress rejected all prior approaches and, with them, certain propositions, in favor of a new attitude toward negotiations by employee representatives.

First of all, there is no indication that Congress even considered the first Executive Order approach where an agency could require that all negotiations be done on off-duty hours. Under this approach, the Comptroller General had first disallowed any travel expenses; he reasoned that the President's decision that agencies could require all negotiating done on an employee's own time meant that the work was "outside the regular tour of duty" and was intended "not to be regarded as official business of the

Government." 44 Comp. Gen., *supra,* at 618. He also reasoned that negotiations or consultations under this limited program consisted of duties performed "primarily in the interest of the employee organization" and not on the government's behalf. *Ibid;* 45 Comp. Gen., *supra,* at 455-456. It was in this context that the Comptroller General ruled that the work was not "official business" within the meaning of the Section 5702 authorization of travel expenses. But even under this severely limited scheme, the Comptroller General later retreated in deference to travel expense guidelines by the agency charged with responsibility for implementing the labor-management program. The Comptroller General deferred to the Civil Service Commission's guidelines, which would allow travel expenses under limited circumstances. For example, the Civil Service Commission said that payment of employee representatives' travel expenses would be justified when the agency chose the site for its own economy and convenience, much like the circumstances in the present case where the agency decided that it was in the best interest of all to begin negotiations at the sites of new facilities. 46 Comp. Gen., *supra,* at 21-22. Such limited travel expenses were available even where there was no requirement that any negotiations be allowed on official time.

Similarly, there is no evidence that Congress considered the second approach tried under the Executive Orders, where official time for negotiations was flatly prohibited. The study committee that issued a report leading to the issuance of Executive Order 11491 had recommended this prohibition reasoning that "an employee who negotiates an agreement on behalf of a labor organization is working for that organization, and should not be in a duty status when so engaged." *Legis. Hist.* 1236. This reasoning was obviously discarded under the new statutory program.

Finally, Congress did explicitly consider and reject the last approach under the Executive Order, which allowed the parties to negotiate for official time. Under this limited scheme, an employee representative could try to negotiate official time for up to 40 hours or one-half the time spent on collective bargaining. The FLRC had stated that "travel expenditures are not authorized" under this very restricted provision. *Legis. Hist.* 1264. The Bureau and the Eighth and Eleventh Circuits have latched onto this single declaration to argue that Congress implicitly ratified the old policy against agency payment of travel expenses. See *United States Department of Agriculture* v. *FLRA*, 691 F.2d 1242, 1245 (8th Cir. 1982), petition for cert. pending, No. 82-979 (filed. Dec. 13, 1982); *Florida National Guard v. FLRA*, No. 81-5466 (11th Cir. Mar. 7, 1983) slip op. 1884. However, this contention – the keystone to the Bureau's argument – fails for a simple reason. There was no such ratification of past practices because Congress completely rejected the Executive Order's treatment of official time. The "ratification" principle upon which the Bureau relies (Br. 17-18) does not apply. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change [citations omitted]." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Different inferences are to be drawn, however, where Congress rejects prior practices and enacts a significantly different provision.

Congress considered, but rejected, the last Executive Order's limited authorization of official time. For its new statutory program, Congress chose instead to provide that *all* time spent in negotiation would be on official time, not just whatever the parties could agree to, in negotiation, up to a specified limit. The original Senate bill contained an official time provision identical to Section 20 of Exec.

Order 11491. S. Rep. No. 95-969, 95th Cong., 2d Sess.112; *Legis. Hist.* 772. But Congress opted in favor of the House version, containing what is now section 7131(a). H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58; *Legis. Hist.* 704. Congressman William Clay, another member of the conference committee and proponent of the legislation,[14] described the official time provision, noting that Title VII imposes heavy responsibilities on labor organizations as well as on management. He stated that "[t]hese organizations should be allowed official time to carry out their statutory representational activities *just as management uses official time* to carry out its responsibilities." 124 Cong. Rec. 9638; *Legis. Hist.* 934. Official time for management representatives engaged in collective bargaining, of course, carries with it the automatic right to travel expenses under 5 U.S.C. (Supp. V) 5702. There is no question but that management representatives perform official government business when assigned bargaining duties.

It can thus properly be said that Congress rejected certain attitudes under the old Executive Order scheme and adopted new ones. It rejected the idea that collective bargaining is not done in the interest of the government and is therefore outside an employee's regular tour of duty. It rejected the notion that employee representatives negotiating agreements are working for the union rather than the government and for that reason should not be carried on duty status. And it clearly discarded the practice of providing only that official time (subject to limits)

[14]The Bureau tries (Br. 35 n. 24) but fails to find a reason to reject Representative Clay's characterization of official time. There may be reason to decline to give weight to those who sponsor legislation significantly different from that eventually enacted. See *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 11 (1968). But Representative Clay endorsed the precise version of the legislation that ultimately was enacted as Section 7131(a). He merely wanted to extend the same official time treatment to the conduct of internal union business, a policy rejected by Congress.

to which the parties could agree. It was only this rejected approach that did not provide for agency payment of travel expenses. Congress's new decision that all negotiation is entitled to official time signifies that such work is the work of the government, done in the government's interest and properly performed within an employee's regular tour of duty. As such, the work is rightfully characterized as "official business" of the government for all purposes, including the travel expense provision of 5 U.S.C. (Supp. V) 5702.

Congress was demonstrably conscious of Section 5702's provision of travel expenses for "official" business and of the relationship between official time and travel expenses. In fact, it assumed that travel expenses would accompany any time spent on official government business. The Civil Service Reform Act provides for resort to the Federal Service Impasses Panel when the collective bargaining process breaks down. 5 U.S.C. (Supp. V) 7119. Such impasse proceedings are explicitly included in the collective bargaining negotiations for which official time is authorized under Section 7131(a). Section 7119(c)(4) provides that each member of the Panel who is not a federal employee is entitled to specified compensation for each day engaged in performance of "official business of the Panel, including travel time, and is entitled to travel expenses as provided under Section 5703 of [Title 5]." This provision of the Travel Expense Act grants expenses to intermittent government employees, and Congress needed to incorporate Section 5703 for those Panel members who were not otherwise employed by the government. Section 7119(c)(4) noted what is implicit in the statute: "A member of the Panel who is a Government employee is not entitled to any additional pay, but is entitled to travel expenses and a per diem allowance." H.R. Rep. No. 95-1403, *supra*, 54;

Legis. Hist. 700. It is clear, therefore, that Congress was aware of the relationship between official business and travel expenses for federal employees when it designated "official time" for union negotiators.

Congress may also be imputed with specific knowledge that "official time" would carry with it rights to travel expenses. Section 7131(c) directs the FLRA to "determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status." There was useful legislative background regarding official time and travel expenses for such administrative proceedings. The FLRA's predecessor in this area was the Assistant Secretary of Labor for Labor-Management Relations, who conducted hearings under the Executive Order program. See Section 6, Exec. Order 11491, *supra*. The Assistant Secretary had promulgated regulations regarding official time and travel. These rules, affirmed by the FLRC, were noted in the FLRC reports contained in the Civil Service Reform Act's legislative history. *Legis. Hist.* 1334. In language very similar to Section 7131(a) and (c), the Assistant Secretary's published regulations provided official time for hearing witnesses "for such participation as occurs during their regular work hours and when they would otherwise be in a work or paid leave status." The regulations specified that such official time included travel time and that "necessary transportation and per diem expenses shall be paid by the employing agency or activity." 29 C.F.R. 206.7(g) (1974 Compilation). See also *id.* 202.17(h) (official time and travel expenses for employees serving as authorized representation election observers).

Thus, there was precedent in the legislative history of Section 7131 provisions for granting travel expenses for "official time" spent in labor relations activities. Under 7131(c), the FLRA has issued interim regulations providing for travel expenses whenever it grants official time to union representatives participating in its proceedings. 44 Fed. Reg. 44771 (July 30, 1979). The Authority properly relied on its Section 7131(c) rulings in its Interpretation providing travel expenses for Section 7131(a) official time (Pet. App. 44a-45a, 9a). Given the historical precedence for official time and travel under the Assistant Secretary's regulations, the Eighth Circuit erred in dismissing the FLRA's analogy to travel expenses pursuant to Section 7131(c). See *United States Department of Agriculture* v. *FLRA, supra,* 691 F.2d at 1250 n.18.

B. Designation of "Official Time" Signifies That the Work Is Official Government Business, Unlike Activities Done On Excused or Administrative Leave.

Congress used the term "official time" rather than providing "leave" for employee representatives engaged in negotiations. "Leave" status would have clearly conveyed that the employees were not performing government business while negotiating. The FLRA correctly reasoned, however, that an employee negotiating an agreement "while on paid time entitled to his or her usual compensation and not in a leave status, is clearly engaged on 'official business for the Government' " (Pet. App. 43a). The designation of official time rather than excused leave status is crucial. The government is not merely excusing an employee's absence from work to allow performance of some other worthwhile function without loss of pay. Rather, Congress has designated the task at hand as "official" – itself the work of the government, carrying all at-

tributes of employment. No reason exists, in law or policy, to carve out the single attribute of travel expense entitlement while an employee possesses all the other characteristics of employment.

Official time status means that the employee is treated as doing the government's work for all the usual purposes. No leave is required – annual, administrative, or leave without pay. The time spent in collective bargaining is credited for accrual of annual leave, sick leave, reduction-in-force retention standing and retirement. See Office of Personnel Management, Federal Personnel Manual, FPM Supp. 296-33, subch. 6, S6-1.5 (April 30, 1981); *Id.* Supp. 831-1, subch. S2. (Sept. 21, 1981).

Other attributes of employment also attach to an employee on official time. For example, the Federal Employee Compensation Act, 5 U.S.C. (Supp. V) 8101 *et seq.* (FECA) provides workers' compensation for disability or death of an employee resulting from injury "sustained while in the performance of his duty." 5 U.S.C. (Supp. V) 8102(a). The Secretary of Labor has exclusive, unreviewable authority to determine the scope of FECA coverage. *DiPippa* v. *United States,* 687 F.2d 14, 16 (3rd Cir. 1982); *Wallace* v. *United States,* 669 F.2d 947, 951 (4th Cir. 1982). Even under the former Exec. Order 10988 program, where official time was allowed but not required, the U.S. Department of Labor determined that an employee representative was covered while engaged in negotiations. FECA Program Memorandum No. 39, dated July 19, 1965 (attached as an addendum to this brief) provided that "a Federal employee will be in the performance of duty for the purposes of the FECA while he travels to or from or while he attends a negotiating session as a representative of a union," provided that the session is held pursuant to the Executive Order and the activi-

ty was "a necessary or reasonable incident of the travel or the meeting." Thus, an employee granted official time by Congress under Section 7131(a) would surely be covered under FECA as being engaged "in the performance of his duty" while negotiating an agreement.

Similarly, the Federal Torts Claims Act, 28 U.S.C. (Supp. V) 1346(b) would almost certainly apply. Under that Act, the federal government is liable for damages caused by the negligence of "any employee of the Government while acting within the scope of his office or employment," in the same manner as private employers. Application of this Act is controlled by state law. See, *e.g.*, *Williams* v. *United States*, 350 U.S. 857 (1955); *Dornan* v. *United States*, 460 F.2d 425, 427 (9th Cir. 1972); *Guthrie* v. *United States*, 392 F.2d 858, 859 (7th Cir. 1968). But provision of official or duty, as opposed to leave, status surely weighs in favor of coverage. It is only when a person is on non-duty status, such as military travel or leave status, that a question even arises as to coverage under this Act. See, *e.g.*, *Garrett Freightlines, Inc.* v. *United States*, 529 F.2d 26 (9th Cir. 1976); *Bissell* v. *McElligott*, 369 F.2d 115 (8th Cir. 1966), cert. denied, 387 U.S. 917 (1967); *Cooner* v. *United States*, 276 F.2d 220 (4th Cir. 1960).

Congress obviously makes a distinction between "official" or duty status[15] on the one hand and leave status on the other. This distinction should not be blurred when Congress carefully chooses which term to apply to a given

[15] "Official time is unquestionably the equivalent of duty status. The reports regarding the Executive Order programs, for example, equated official time with duty hours as opposed to non-duty hours. See *Legis. Hist.* 1236. While Section 7131(a) bestows official time only "during the time the employee otherwise would be in a duty status,"

activity. For example, Congress treats general witness or jury duty differently than "official duty" court appearances. For the former, Congress has provided a form of excused "leave" so that an employee can perform such duties of citizenship without loss of pay or service credit. 5 U.S.C. (Supp. V) 6322(a). But Congress designated a different status for work-related court functions A government employee is performing "official duty" when summoned or assigned by his agency to testify or produce official records on behalf of the government or to perform the same functions on behalf of a non-governmental party *Id.* 6322(b). This distinction, made in the same statute, is one with a difference because of the attributes of employment that attach to official duty. See generally 38 Comp. Gen. 307, 310 (1958) (employee testifying in his "official capacity" entitled to compensation without regard to application of "court leave" provisions). Significantly, in designating such official duty status, Congress at the same time specified that Section 5702 travel expenses were available for official testimony on behalf of a non-governmental party, in order to overturn a contrary Comptroller General decision. 5 U.S.C. (Supp. V) 5751(b); S. Rep. No. 91-1371, 91st Cong., 2d Sess. 5.

Similarly, Congress has provided "leave" without loss of pay or service credit for reserve and National Guard duty. 5 U.S.C. (Supp. V) 6323. Moreover, agencies may grant "excused leave" for such worthwhile endeavors as blood

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this condition merely places a limit on official time for negotiation. That is, like the former Assistant Secretary regulations allowing travel expenses but no overtime pay, no premium pay is allowed. See 29 C.F.R. 206.7(g) (1974 Compilation). The Eighth Circuit was therefore clearly wrong in concluding that the statute draws a distinction between official time and duty status. *United States Department of Agriculture v. FLRA*, *supra*, 691 F.2d at 1249 n. 16.

donations, voter registration and voting. Federal Personnel Manual, FPM Supp. 990-2, bk 630, subch. S11 (May 23, 1968, rev'd July 1969). But the Bureau is wrong in equating (Br. 33 n. 23) these "public interest" activities, granted without any statutory authority, with activities for which Congress provides statutory "official time." There is a critical distinction between activities the government wishes to encourage by allowing leave without loss of pay and activities for which Congress designates "official time" or duty status. The former obviously carries no other attributes of employment, while the latter by definition means that an official employment relationship exists. As discussed above, when an employee is on official time or status, other attributes of employment attach to the employee's activities.[16]

Finally, the legislative history and purposes of Section 5702 suggest that it would apply to any employee on official time. The Travel Expense Act, of course, deals with "official business" and "official travel." The legislative history of that Act and its 1926 predecessor support the conclusion that travel expenses were intended to apply to anyone on "travel duty," "travel status," "authorized travel" or one traveling on "official duty." See, *e.g.*, S. Rep. No. 81-428, 81st Cong., 1st Sess. 1, 2; *Subsistence Expenses and Mileage Allowances of Civilian Officers and Employees of the Government: Hearings on H.R. 3005 Before the Committee on Expenditures in the Executive*

[16]Indeed, when the President has provided "official time" he has coupled that privilege with travel and per diem rights. See Exec. Order 10529 (civil defense activities), set forth at Federal Personnel Manual, FPM Supp. 990-2, bk. 630, subch. S11-3. This Executive Order provides that "official time" may be authorized for employees participating in recognized civil defense programs, with provision of "travel allowances and expenses." Section 2(b), 3.

Departments, 81st Cong., 1st Sess. 82, 102 (1949); H.R. Rep. 69-888, 69th Cong., 1st Sess. 3, 6, 7. These descriptions obviously apply to an employee engaged in collective bargaining under Section 7131(a). Moreover, the Travel Expense Act was passed in order to eliminate the hardship of employees traveling on the job. The FLRC reports establish that this was the same sort of hardship that "official time" provisions are intended to remedy. *Legis. Hist.* 1265, 1335.

C. Employer Payment of the Travel Expenses of Union Negotiators is Entirely Consistent With the Labor-Relations Scheme in the Federal Sector.

One of the Bureau's primary arguments is that it would be illogical for the government as an employer to pay travel expenses incurred by its "opposition" – *i.e.*, the employee representative. The Bureau emphasizes that, in the private sector, employer payment of union negotiation expenses is not the norm but only an extraordinary remedy for bad faith bargaining (Br. 20-21). See *Florida National Guard v. FLRA, supra,* slip op. 1885 n. 11. This argument, however, completely overlooks the unique ties that exist between the federal government as employer and federal employee unions. The fact is that the union in the federal sector is treated quite differently than its private sector counterpart. The government as employer has chosen to nurture and actually subsidize federal sector unions for cogent policy reasons. The employer payment of employee negotiation expenses is thus wholly consistent with the overall statutory scheme.

As already described, Title VII reflects Congress's studied decision to strengthen and expand the collective bargaining process in the civil service. Congress made this

choice for one predominant reason – because of its conviction that a stronger collective bargaining program would translate into higher productivity, greater efficiency and increased harmony in the performance of government functions. 5 U.S.C. (Supp. V) 7101. See *supra* pp. 17-18. There was certainly some concern for the federal government's unique ethical responsibilities for fair and equitable labor relations. See, *e.g.*, 124 Cong. Rec. 29196, 33389 (1978), *Legis. Hist.* 950, 1039 (statements of Rep. Lott, Sen. Ribicoff); Report of the President's Task Force on Employee-Management Relations in the Federal Sector (1961), *Legis. Hist.* 1195; Federal Personnel Management Project, Option Paper Number Four (1977), *Legis. Hist.* 1363. But the prime motivation behind the collective bargaining program was to provide employees a greater voice and thus achieve greater productivity with a more cooperative and better motivated workforce.

Providing federal employees with the requisite input proved difficult, however, for two reasons. Congress also chose to grant employee organizations a very narrow role, while giving them heavy responsibilities on behalf of all employees. The role of federal employee unions, as compared with that of private sector unions, is extremely circumscribed. Congress unilaterally sets wages for government workers and dictates many other aspects of employment left to negotiation in the private sector. The statutory definition of "collective bargaining" regarding "conditions of employment" excludes, *inter alia,* matters that are "specifically provided for by federal statute." 5 U.S.C. (Supp. V) 7103(a)(12) and (14)(C). Such basic labor issues as pay, pensions, leave, insurance, layoff procedures, and seniority rights are thus completely excluded from the federal bargaining table. In addition, the agency cannot negotiate concerning any "Government-wide rule or

regulation." *Id.* 7117. Moreover, the Civil Service Reform Act reserves specified "management rights" for the complete authority of the government agency rather than for the negotiating table as under the National Labor Relations Act. These management prerogatives include the broad authority to determine the "mission, budget, organization, number of employees, and internal security practices of the agency." *Id.* 7106(a)(1). The government also retains the right to control through legislation such basic practices as hiring, assigning, directing layoff, retention, suspension, removal, reduction in grade or pay, and disciplining of federal employees. *Id.* 7106(a)(2)(A). Employee organizations are given authority to negotiate only over the "procedures which management officials will observe in exercising any authority under this section" and the "appropriate arrangements for employees adversely affected." *Id.* 7106(b)(2) and (3). In addition, of course, federal employees are deprived of the main bargaining chip held by private sector unions. Strikes and work stoppages are strictly prohibited. *Id.* 7116(b)(7). Government employees are therefore left without the normal economic clout to back up their bargaining positions.

While giving federal employee unions only limited bargaining rights, Congress adopted another policy also tending to undermine the union's efficacy. It extended the union's services to non-union members without providing for the financial security of an "agency shop" whereby non-members would pay representational fees. An exclusive representative in the federal sector "act[s] for, and negotiate[s] collective bargaining agreements covering, all employees in the unit." 5 U.S.C. (Supp. V) 7114(a)(1). All employees are therefore entitled to the union's services without having to pay dues or service fees. The union must represent the interests of all employees "without

discrimination and without regard to labor organization membership." *Ibid.* And the union's collective bargaining responsibilities are very specific. Its duty to engage in good faith bargaining includes the statutory duty "to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays." *Id.* 7114(b)(3). The union must, for every negotiation session, provide "duly authorized representatives prepared to discuss and negotiate on any condition of employment." *Id.* 7114(b)(2).

Congress was quite concerned about the added costs of doing business that it was imposing upon federal employee unions. To compensate for giving unions such a limited role while imposing costly duties, Congress considered, but then decided against allowing, an "agency shop" where all employees must pay union dues or representational fees. See, *e.g.*, Supplemental Views to H.R. 11280, *Legis. Hist.* 722. Negotiation of the agency shop is, of course, allowed in the private sector in the majority of states, where there are no right-to-work laws prohibiting the practice. See 29 U.S.C. (Supp. V) 158(a)(3), 164(b). But Congress ultimately prohibited the agency shop for federal employee unions, 5 U.S.C. (Supp. V) 7102, deciding in favor of other types of union security arrangements. See Task Force 6 Report; *Legis. Hist.* 1440-1442. There was hot debate over this decision "to have the taxpayer shoulder the burden of some of the incidental costs associated with maintaining a union." 124 Cong. Rec. 29196 (1978); *Legis. Hist.* 950 (statement of Rep. Lott). But Congress clearly decided in favor of providing unions with benefits and actual subsidization unknown in the private sector.

For example, the government pays for all union dues

collection. When an employee authorizes the agency to deduct periodic union dues, the "allotment shall be made at no cost to the exclusive representative or the employee." 5 U.S.C. (Supp. V) 7115(a). The government also provides "customary and routine services and facilities" to unions. *Id.* 7116(a)(3). Another unprecedented benefit is that the government must remain neutral in union elections. Government officials cannot, like their private employer counterparts, argue against unionization. See 124 Cong. Rec. 29193 (1978); *Legis. Hist.* 945 (statement of Rep. Ford). A most they may encourage employee voting, correct the record regarding false statements, and inform "employees of the Government's policy relating to labor-management relations and representation" – *i.e.*, that unions and collective bargaining are in the public interest. 5 U.S.C. (Supp. V) 7116(e); 124 Cong. Rec. 38716 (1978), *Legis. Hist.* 996 (statement of Rep. Ford). See generally, *Department of the Air Force, Air Force Plant Representative Office, Detachment 27, Fort Worth Texas and NFFE Local 1958 and AFGE Local 1361*, 5 F.L.R.A. No. 62 (Apr. 17, 1981).

Finally, of course, there is the unique "official time" provision itself, under which the government pays for significant amounts of employee time spent in representational activities. 5 U.S.C. (Supp. V) 7131(a) and (d). The very concept of "official time" is peculiar to the public sector, where both union and management negotiators are routinely employed by the same entity. In the private sector, by contrast, union negotiators are most often employed by the union, not the affected company, so that the question of the employer paying for negotiating time for the union would not even arise. Moreover, Congress's decision to *require* agencies to provide official time for any employee representatives stands in stark contrast to

private sector practice. Where employees of the company do negotiate on behalf of their union, the National Labor Relations Act does not require the employer to pay for any such negotiating time. Employers may provide leave — not to be confused with "official time" — but such a practice is a subject for bargaining; it is not required. See *Axelson, Inc. v. NLRB*, 599 F.2d 91 (5th Cir. 1979). Thus, the practice for private employers is analogous at most to the discarded Executive Order program where paid time was merely open to negotiation, not required.

For these reasons, the Bureau's analogy to the private sector is entirely inappropriate. Private businesses do not pay travel expenses for union representatives because there is an entirely different management-union relationship from that in the public sector. By contrast, government payment of travel expenses incurred by employee representatives is wholly consistent with the statutory scheme in the federal sector where the government subsidizes certain costs of union representation, including the major cost of negotiating time. The Civil Service Reform Act strives to nurture and support federal employee unions, in a manner unknown in the private sector, so that labor organizations will be able to provide their limited, but important, services to all federal workers.

D. The FLRA, the Agency Charged With Carrying Out the Purposes of the Civil Service Reform Act, Correctly Interpreted the Official Time Provision in a Manner that Furthers the Goals of the Statute.

There is no question but that Congress left issues of statutory construction to the FLRA's expertise. The Act directs that "[t]he Authority shall provide leadership in establishing policies and guidance relating to matters

under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this Chapter." 5 U.S.C. (Supp. V) 7105(a)(1). The statute provides for judicial review of Authority decisions under the Administrative Procedure Act, so that its decisions may be overturned only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* 7123(c), 706(a)(A). Accordingly, the court below correctly determined that the Authority's construction of the official time provision should be affirmed if "reasonably defensible" (Pet. App. 5a). See *Department of Defense v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).[17] The Ninth Circuit correctly determined that "[t]he FLRA, acting in its own area of expertise, has interpreted the relevant language of Title VII in a clearly defensible manner, and we are neither permitted nor inclined to substitute a different judgment" (Pet. App. 11a). See also *United States Department of Agriculture v. FLRA, supra*, 691 F.2d at 1251 (dissent);[18] *Division of Military and Naval Affairs v. FLRA, supra*, 683 F.2d at 49 (dissent).

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[17] In this respect, as in many others, the FLRA is much like the NLRB, whose defensible construction of the NLRA is entitled to considerable deference. See, *e.g.*, *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979); *NLRB v. Local Union No. 103*, 434 U.S. 335, 350 (1978). While Congress did not intend courts to rubber stamp FLRA decisions, but to ensure reasoned statutory interpretation (124 Cong. Rec 38718 (1978); Legis. Hist. 1000 (statement of Rep. Ford)) the FLRA's construction in this case is clearly sound.

[18] As Judge Heaney correctly pointed out in his dissent (691 F.2d at 1252 n. 2), the FLRA's interpretation is not owed less deference because it refers to the Travel Expense Act. The Authority was construing Congress's intent under the later-enacted Civil Service Reform Act. "[T]he core of the FLRA's analysis was based on its interpretation of federal labor relations policy, a matter within its specified authority and deserving of obvious deference." *Ibid.*

The specific question whether "official time" includes travel expenses is precisely the type of question best left to the FLRA's discretion. Normally, the Comptroller General has final authority to authorize expenditure of public funds for such things as travel expenses. But Congress expressly decided to deny him a voice in Civil Service Reform Act matters, choosing instead to vest the FLRA with full responsibility for spending authorization. As Representative Ford remarked, "[w]e have precluded the intrusion of nonlabor relations entities, such as the Comptroller General, into the bargaining and dispute resolution process at both the agency and Authority levels." 124 Cong. Rec. 38718; *Legis. Hist.* 1000. Even when the Comptroller General had a role in regulating travel expenses of employee representatives under the Old Executive Order schemes, however, he deferred to the expertise of the entity then in charge of labor-management issues. Thus, the Comptroller General informed the Chairman of the Civil Service Commission that the Comptroller's office would bow to CSC guidelines establishing "necessary standards for a reasonable and uniform exercise of the discretionary administrative authority you consider essential to the fulfillment of the objective of employee-management cooperation as contemplated by Executive Order No. 10988." 46 Comp. Gen., *supra*, at 22. Similarly, the Comptroller General now declines to issue decisions on any matter "more properly within the jurisdiction of the Federal Labor Relations Authority...." 4 C.F.R. 22.8. See, *e.g.*, *American Federation of Government Employees, Local 2459*, B-210565 (Mar. 25, 1983); *Gerald M. Hegarty*, 60 Comp. Gen. 578, 580 (1981). Thus, it is clear that the FLRA's rulings regarding expenditures under the Act control. And the Authority's decision regarding travel expenses is entirely sound and in full accord with applicable principles.

First of all, for the reasons discussed above in detail, the FLRA's interpretation gives proper significance to Congress's rejection of past practices under the old Executive Order program. Moreover, the Civil Service Reform Act is unquestionably remedial legislation that is to be broadly construed to effectuate the statutory purposes. See, *e.g.*, *Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). See also 124 Cong. Rec. 38718 (1978); *Legis. Hist.* 1000 (statement of Rep. Ford). The FLRA's decision furthers the important statutory purposes of encouraging collective bargaining and correcting inequalities that greatly favored management under the Executive Order. The decision also interprets the statute "in a manner consistent with the requirement of an effective and efficient Government," as specified by 5 U.S.C. (Supp. V) 7101(b).

Congress rejected the collective bargaining scheme under the Executive Order as being too "management-oriented." 124 Cong. Rec. 25613, 25710, 25721 (1978); *Legis. Hist.* 844, 849, 854 (statements of Rep.'s Clay and Ford). As discussed above, Congress wanted to strengthen the union's position as much as possible within the limited areas allowed to it. While depriving the federal employee union of much collective bargaining jurisdiction allowed to labor organizations in the private sector, Congress also granted certain advantages. 124 Cong. Rec. 29196 (1978); *Legis. Hist.* 951 (statement of Rep. Ford). The bill in general was intended to "put Federal workers [sic] unions on equal footing with management in labor disputes during contract negotiations and during consultations." 123 Cong. Rec. 8524 (1977); *Legis. Hist.* 1005 (statement of Sen. Inouye). As to official time in particular, unions were to "be allowed official time to carry out their statutory representational activities *just as management uses official*

time to carry out its responsibilities." 124 Cong. Rec. 29188 (1978); *Legis. Hist.* 934 (statement of Rep. Clay; emphasis added).

Interpreting official time as including the right to travel expenses, just as it does for management, thus comports with Congressional intent. See Pet. App. 44a., Such an interpretation puts the union on more equal footing with management, which may choose at will to travel for negotiations. See *id.* at 10a. Similarly, as the Authority reasoned, its interpretation "also facilitate[s] more effective union representation at the bargaining table, thereby implementing the purpose of the statute . . ." (Pet. App. 44a). In advocating removal of the old prohibition against official time, the FLRC had stated in its 1971 Report that such inequality between labor and management had "some unfavorable effects on the negotiation process; for example, difficulties in scheduling negotiation sessions, and delays in completing negotiations because of a union's inability to provide representation." *Legis. Hist.* 1265. Provision of travel expenses for management, but not labor, negotiators can obviously have the same adverse consequences, albeit to a lesser degree. Thus, the FLRA's construction of the official time provision as including travel expenses will promote effective collective bargaining.

The court below correctly rejected the Bureau's contention that availability of travel expenses would adversely affect collective bargaining by impairing the willingness of union negotiators to reach an agreement. We fail to understand how the mere provision of travel expenses, where official time is unquestionably allowed, would lead a union to drag its feet. In any event, as the court below pointed out, the statute provides a check against such conduct. The Act mandates good faith negotiations and pro-

vides recourse to the Federal Service Impasses Panel (Pet. App. 11a). As the court below reasoned, the FLRA's interpretation "yields no more advantage to labor negotiators than that formerly possessed by management negotiators," who were surely not corrupted by their entitlement to expenses.

Neither of the statutory construction principles upon which the Bureau relies (Br. 25-27) is applicable. First of all, this is simply not a sovereign immunity situation. The government has clearly subjected itself to unfair labor practice proceedings, whereby the FLRA determines what agency expenditures are required by the statute. The Bureau also apparently argues that every statute authorizing public expenditures should be strictly construed. The cases cited, however, merely stand for the unchallenged proposition that expenditure of public funds is proper only when actually authorized by Congress. See *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion); *United States v. Zazove*, 334 U.S. 602 (1948); *Pine Hill Coal Co. v. United States*, 259 U.S. 191, 196 (1922). We certainly agree that government liability for expenditures should not be superimposed on statutes where it does not exist. The question here, however, is simply one of statutory construction. Our position is that the FLRA correctly divined Congressional intent in providing official time.

Moreover, the Bureau expresses unreasonable fears (Br. 23 n. 16) over management's lack of budgetary control. The statute imposes significant limits on official time and, concommitantly, on travel expenses. Such privileges are available only "during the time the employee otherwise would be in a duty status" – *i.e.*, no overtime is authorized. Section 7131(a). The provision also specifies that

"[t]he number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes." *Ibid.* Of course, in this case, management had four representatives and the union only one – a not uncommon situation. But, in any event, the agency can control costs by keeping down its own number of representatives, thus limiting employee representative costs.

In addition, subsequent FLRA decision have further limited availability of official time and expenses. A union representative must be part of the relevant bargaining unit to receive official time, and official time need not be authorized for negotiation of a local supplement to a national master agreement. *Air Force Logistics Command, Wright-Patterson AFB, Ohio and Wright-Patterson AFB Fire Fighters,* 7 F.L.R.A. No. 118 (Jan. 22, 1982); *Interpretation and Guidance,* 7 F.L.R.A. No. 105 (Jan. 15, 1982). We also note that agency supervisors have the authority to ensure that expenses of union representatives are necessary and reasonable. See FPMR 101-7, Bulletin FPMR A-40, Supp. 1, Ch. 101.4 (Sept. 28, 1981). Whatever standards exist for authorizing travel for management representatives will equally apply to union representatives.[19] There is certainly no danger that union representatives will incur extravagant expenses.

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[19]The Bureau objects (Br. 23) to the FLRA's decision in *Dept. of the Air Force, Air Force Logistics Command and AFGE, Council 214,* 10 F.L.R.A. No. 53 (Sept. 30, 1982). The Authority there held that departments could not require justification from unions for selection of out-of-town negotiators. But, as the FLRA reasoned, the union does have a clear statutory prerogative to designate its own representatives. These employee representatives are already unquestionably entitled to official time; they are, however, subject to the limitations discussed above.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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ADDENDUM

U.S. DEPARTMENT OF LABOR
Bureau of Employees' Compensation
Washington, D.C. 20211

FECA PROGRAM MEMORANDUM NO. 39

SUBJECT: SECTION 1(a), FECA - FEDERAL UNION OFFICIALS

Executive Order 10988 establishes the basis for employee-management cooperation in personnel and related matters within the Federal Service. In the case of any employee organization which has been formally recognized by a Federal agency or has been recognized as the exclusive representative of agency employees the Order requires that the employee organization be given the opportunity to be represented at negotiations and/or discussions between management and employees or employee representatives for the formulation and implementation of personnel policies.

The Bureau has determined that a Federal employee will be in the performance of duty for the purposes of the FECA while he travels to or from or while he attends a negotiating session as a representative of a union provided (1) the negotiating session is one held pursuant to an agreement between the union and the agency officials as provided in Executive Order 10988, and (2) at the time of the injury he was doing something which is a necessary or reasonable incident of the travel or the meeting.

/s/

John J. Newman
Assistant Director – FECA

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